Supreme Judicial Court of Massachusetts.

NORCROSS *v.* JAMES.

Covenants running with the land may be divided into two classes, viz., those annexed to the estate, such as the ancient warranty now represented by the usual covenants for title, and those which are attached to the land itself, such as rights of common or easements.

Covenants of the latter class, in order to be enforceable against the assignees of the covenantor, must "touch and concern," or "extend to the support of" the land conveyed.

A covenant in a deed for land containing a quarry that the grantor will not open or work or allow to be opened or worked, any quarry on a certain farm then owned by the grantor adjoining the land conveyed, is not such a covenant as may be enforced against the assigns of the grantor.

THIS was a bill in equity to restrain the defendants from the breach of a covenant in a deed from one Luke Kibbe, Jr., to William N. Flynt. The case was reported to the full bench of the Supreme Court on an agreed statement of facts, in which it appeared that one of the inducements of the purchase of the estate was the valuable quarry of marble it contained, and the covenant the deed contained restraining the quarrying of marble on the adjoining land. The plaintiff contended that the covenant was one that ran with the land, and, as such, was binding on the heirs and assigns of the covenantor, in favor of the heirs and assigns of the covenantee. The defendant contended that it was personal, and that it was also void, as being in restraint of trade. The material facts appear in the opinion.

James G. Dunning, for the plaintiff.

Charles L. Long, for the defendant.

The opinion of the court was delivered by

HOLMES, J.—One Kibbe conveyed to one Flynt a valuable quarry of six acres, bounded by other land of the grantor, with covenants as follows: "And I do for myself, my heirs, executors and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seised in fee of the afore-granted premises, that they are free of all incumbrances, that I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said Long Meadow." By mesne conveyance the plaintiffs have become pos-

sessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred to in the covenant. The defendants are quarrying stone in their land like that quarried by the plaintiffs and the plaintiffs bring their bill for an injunction.

The discussion of the question under what circumstances a landowner is entitled to rights created by way of covenant with a former owner of the land has been much confused since the time of Lord COKE, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land, and those which are said to be attached to the land itself.

"So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land:" *Chudleigh's Case*, 1 Rep. 122 b.; s. c. Popham 70, 71.

Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question, How an assignee could sue upon a contract to which he was not a party (West, Symboleog. I. sect. 35; Wingate's Maxims 44, pl. 20, 55, pl. 10; Co. Litt., 117a; *Sir Moyle Finch's Case*, 4 Inst. 85). But an heir could sue upon a warranty of his ancestor, because for that purpose he was *eadem persona cum antecessore*. (See Y. B., 20 & 21 Ed. I., 232 (Rolls ed.); *Oates* v. *Frith*, Hob. 180; *Bain* v. *Cooper*, 1 Dowl. Pr. Cas. N. S. 11, 14). And the conception was gradually extended in a qualified way to assigns where they were mentioned in the deed; Bract. fol. 17 b; 67 a, 380 d; 381; Fleta. III. chap. 14, sect. 6; 1 Britton (Nich.) 255, 256; Y. B., 20 Ed. I. 232–234 Roll's ed.); Fitz. Abr. *Covenant*, pl. 28; Vin. Abr. *Voucher* N, p. 59; Y. B. 14 H. 4, 56; 20 H. 6, 34 b; Old Natura Brevium, *Covenant*, 67, B. C. in Rastell's Law Tracts, ed. 1534; Dr. and Student, I., chap. 8; F. N. B. 145 c; Co. Litt., 384 b; Com. Dig. *Covenant*, B 3; *Middlemore* v. *Goodale*, Cro. Car. 503; s. c. Id. 505; W. Jones 406; *Philpot* v. *Hoare*, 2 Atk. 219. But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same status or inheritance, and thus the same *persona quoad* the contract. But as will be seen, the privity of estate which is thus required, is privity of the estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the

ancient books. See further, Y. B., 21 & 22 Ed. I. 148 (Roll's ed.); 14 Hen. IV., pl. 5. Of course we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure. F. N. B. 134 E. We may add that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir as representing the person of his ancestor. Y. B., 32 & 33 Edw. I. 516 (Roll's ed).

On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor. "So a disseisor, abator, intruder, or the lord by escheat, &c., shall have them as things annexed to the land. *Chudleigh's Case, ubi supra.* (See 1 Britton [Nichols' ed.] 361; Keilway, 145, 146, pl. 15; F. N. B. 180 N.; *Sir H. Nevil's Case*, Plowden 377, 381.) In like manner, when, as was usual, although not invariable, the duty was regarded as falling upon land, the burden of the covenant, or grant, went with the servient land into all hands, and of course there was no need to mention assigns. See cases *supra et infra.* The phrase consecrated to cases where privity was not necessary was *transit terra cum onere.* (Bract., fol. 382, *a. b.* Fleta, VI., chap. 23, sect. 17. See Y. B., 20 Ed. I. 360 [Roll's ed.]; Keilway 113 pl. 45.) And it was said that "a covenant which runs and rests with the land lies for or against the assignee at common law, *quia transit terra cum onere*, although the assignee be not named in the covenant." (*Hyde* v. *Dean of Windsor*, Cro. Eliz. 552; Ibid. 457, s. c. 5 Co. Rep. 24 a; Moore 309.)

It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant: It is enough for our present purposes that it carried the right of property. Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is *Pakenham's Case*, Y. B., 42 Ed. III., pl. 14, when the plaintiff recovered in covenant as terre-tenant, although not heir, upon a covenant or prescriptive duty to sing in the chapel of his manor: *Spencer's*

Case, 5 Co. Rep. 16*a*, 17*b*. Another which has been recognised in this Commonwealth is the *quasi* easement to have fences maintained: *Bronson* v. *Coffin*, 108 Mass. 175, 185; s. c. 118 Id. 156. Repairs were dealt with on the same footing: they were likened to estovers and other rights of common: 5 Co. Rep. 24 *a. b; Hyde* v. *Dean of Windsor*, *ubi supra*. See F. N. B. 127; *Spencer's Case*, *ubi supra; Ewre* v. *Strickland*, Cro. Car. 240; *Brett* v. *Cumberland*, 1 Roll. R. 359, 360; and other examples might be given. See Bract. 382, *a. b.;* Fleta, vi., c. 53, § 17; Y. B., 20 Ed. I., 360; Keilway 2 *a*, pl. 2; Y. B., 6 Hen. VII., 14 *b*, pl. 2; Co. Litt. 384 *b*, 385 *a.*; *Cockson* v. *Cock*, Cro. Jac. 125; *Bush* v. *Cole*, 12 Mod. 24; s. c. 1 Salk. 196; 1 Shower 388; Carthew 232; *Sale* v. *Kitchenham*, 10 Mod. 158. The cases are generally landlord and tenant cases, but that fact has nothing to do with the principles laid down.

When it is said, in this class of cases, that there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or *quasi*-easement, or must be in aid of such a grant (*Bronson* v. *Coffin*, *ubi supra*), which is generally true, although, as has been shown, not invariably (*Pakenham's Case*, *ubi supra*), and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression, privity of estate, in this sense is of modern use, and has been carried over from the cases of warranty where it was used with a wholly different meaning.

In the main, the line between the two classes of cases distinguished by Lord COKE is sufficiently clear; and it is enough to say that the present covenant falls into the second class, if either. Notwithstanding its place among the covenants for title, it purports to create a pure negative restriction on the use of land, and we will take it as intended to do so for the benefit of the land conveyed.

The restriction is in form within the equitable doctrine of notice: *Whitney* v. *Union Railway Co.*, 11 Gray 359; *Parker* v. *Nightingale*, 6 Allen 341. See *Tulk* v. *Moxhay*, 2 Phillips 774; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; *London & S. W. Railway Co.* v. *Gomm*, 20 Ch. Div. 562; *Austerberry* v. *Oldham*, 29 Id. 750. But as the deed is recorded, it does

not matter whether the plaintiff's case is discussed on this footing or on that of easement.

The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognise as creating an easement, every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants, applies also to negative ones. They must "touch and concern," or "extend to the support of the thing" conveyed: 5 Co. Rep. 16 *a*, Ibid. 24 *b*. They must be "for the benefit of the estate:" *Cockson* v. *Cock*, Cro. Jac. 125. Or as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden: *Keppell* v. *Bailey*, 2 My. & K. 517, 535; *Ackroyd* v. *Smith*, 10 C. B. 164; *Hill* v. *Tupper*, 2 H. & C. 121.

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked, what is the difference in principle between an easement to have land unbuilt upon, such as was recognised in *Brooks* v. *Reynolds*, 108 Mass. 31; and an easement to have a quarry left unopened, the answer is, that whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly —an easement not to be competed with—and in that interest alone a right to prohibit one owner from exercising the usual incidents

of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it be treated as merely personal in its burden. Whether that is its true construction, as well as its only legal operation, and whether, so construed, it is or is not valid, are matters on which we express no opinion.

Bill dismissed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ERRORS OF CONNECTICUT.[2]
SUPREME JUDICIAL COURT OF MAINE.[3]
COURT OF ERRORS AND APPEALS OF MARYLAND.[4]
SUPREME COURT OF OHIO.[5]

ACTION.

Suit by Prospective Heirs.—The principle is, both at law and in equity, that no one is entitled to be recognised as heir until the death of the ancestor or person from whom the descent may be cast; and the fact that such ancestor or other person may be alleged and admitted to be *non compos mentis*, or otherwise incapable of managing his estate, makes no exception to the general principle: *Sellman* v. *Sellman*, 63 Md.

The children of a grantor cannot maintain a bill in their own names, as parties complaining, against the grantor himself and his grantee, for the purpose of impeaching and having set aside a conveyance, upon the ground of fraud and undue influence, and because such conveyance would operate to defeat their future inheritance: *Id.*

AGENT. See *Criminal Law.*

ASSIGNMENT. See *Contract.*

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 115 U. S. Rep.

[2] From John Hooker, Esq., Reporter; to appear in 52 Conn. Rep.

[3] From J. W. Spaulding, Esq., Reporter; to appear in 77 Me. Rep.

[4] From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

[5] From George B. Okey, Esq., Reporter; to appear in 43 Ohio St. Rep.